APPENDIX A

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Supp. V., § 201 *et seq.*

SEC. 3. As used in this Act—

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(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

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(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *.

(e) "Employee" includes any individual employed by an employer.

* * * * *

(g) "Employ" includes to suffer or permit to work.

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(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.

* * * * *

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods

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for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

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SEC. 16. * * *

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

APPENDIX B

Report of the Administrator on Senate Resolution 325:

NOVEMBER 30, 1940.

Honorable ELBERT D. THOMAS,
Chairman, Committee on
Education and Labor,
United States Senate, Washington, D. C.

DEAR SENATOR THOMAS: In response to your letter dated October 19, 1940, I have considered and am pleased to submit my report on S. Res. 325, now pending before the Education and Labor Committee.

As I advised you in my letter of October 31, 1940, the Wage and Hour Division was currently making an investigation in the matter of the wages and other conditions and practices of employment of red caps at the Grand Central Terminal in New York City and at the Washington Terminal Company, of this city. Preliminary findings of the inspectors in charge of these investigations, together with experience accumulated by the division in dealing with the matter in other respects since October 24, 1938, lead me to recommend that S. Res. 325 be adopted.

As is indicated in the preamble to the resolution, the wages and other conditions and practices of the employment of red caps have been a matter of continuing administrative investigation and concern since the effective date of the act, October 24, 1938. It is common knowledge, and, indeed, a matter

of administrative finding upon investigation, that prior to the effective date of the act the majority of red caps employed at railroad terminals were compensated for their services solely by tips or gratuities given them by the traveling public. At or about the time of the effective date of the act, the railroads conceived and put into effect a so-called accounting and guarantee system of compensating red caps, in view of the minimum wage requirement of the act. Under this system each company purported to guarantee the payment to each of its red caps of any additional sum required to bring the red cap's compensation by tips up to the minimum wage prescribed in the Fair Labor Standards Act. The red cap was "permitted" to retain possession of the tips, but was required to report daily the amount of tips received. This was the "accounting" aspect of the system and served to determine the company's liability, if any, on its "guarantee." As far as we know, notification of the public by the companies of the inauguration of the accounting and guarantee system was the exception and not the rule. On the other hand, each company manifested a high degree of care and diligence in notifying each red cap of the inauguration of the system, and the diligence of the companies in this respect appears to have been matched by an equal degree of diligence on the part of red caps and their union representatives who promptly protested to the companies' officials that they did not approve the system because they thought it violated the minimum wage requirements of the Fair Labor Standards Act.

Shortly after the inauguration of the system by the companies, a group of lawyers representing the railroad companies and

individuals representing the red caps solicited an opinion of the Administrator whether the accounting and guarantee system was legal under the act. The union representatives claimed that the system was imposed upon the red caps over their protest and already was forcing them, through fear of loss of their jobs, into the practice of reporting to the companies the receipts of tips equal to the minimum wage even though such receipts actually were less than the minimum wage. The purpose of such reporting it was claimed was to relieve the company of any liability on its "guarantee," and thereby keep their jobs. Because at that time limitations upon personnel and administrative funds made it impossible for the Administrator promptly to investigate these claims, the Administrator (Elmer F. Andrews) wisely refrained from indicating his opinion with respect to the system which, hypothetically presented, failed to show adequate safeguards against the practices which the union officials alleged to exist in fact.

Notwithstanding the failure by the legal representatives of the railroads to obtain an opinion of the Administrator concerning the legality of the system under the act, and notwithstanding widespread dissatisfaction of the red caps with the system as evidenced to the Administrator by numerous written complaints filed with him by the red caps, the railroads continued to operate under the system.

By June 1939 so many complaints had been received by the Administrator that the accounting practice under the system was producing inaccurate if not false records kept by the companies for purposes of the act, that the Administrator duly published a notice of a public hearing to be conducted

before his designated representative to determine what if any amendment should be made to the Administrator's record keeping regulations to provide specially for records to be kept by employers of red caps. The hearing was held on June 27 and 28, 1939 and the presiding officer's findings and recommendations were published on October 14, 1939. Much of the evidence produced at the hearing tended to bear out the representations originally made to the Administrator by the Union representatives that the system was being fraudulently operated, both in the "accounting" and the "guarantee" practices. The presiding officer found on all the evidence that there could be no conclusion other than that the pay roll records of the carriers for red caps generally did not accurately record the data as to the wages paid. He also expressed grave legal doubt as to the validity of the system under the act. A copy of these findings and recommendations is enclosed for your perusal. Also enclosed is a copy of the amendment to the Administrator's record keeping regulations providing for additional records to be kept by employers of employees engaged in tipping occupations, such as red caps.

Shortly before the above-mentioned public hearing in June 1939, the Administrator designated representatives of the division to investigate complaints received from red caps employed at the Cincinnati Union Terminal Company and, as indicated in the preamble to S. Res. 325, upon finding evidence of flagrant violations of the minimum wage and record keeping provisions of the act, the Administrator caused a civil action to be instituted against the company under section 17 of the act to restrain such violations. The company in its answer joined issue as to the

Administrator's allegations, but when served by counsel for the Administrator with a trial notice it publicly announced the abandonment of the accounting and guarantee system and the simultaneous inauguration of a new plan whereunder, commencing February 1, 1940, red caps were to be regarded as employees of the company and to be paid wages at the minimum rate required by the act, but were also to be required to collect from each passenger and pay to the company the proceeds of a charge of 10 cents for each bag or parcel carried. The attorneys for the company immediately insisted that such action made the Administrator's proceeding moot, and the District Court of the United States for the Southern District of Ohio, in which the proceeding was pending, agreed and entered judgment dismissing the Administrator's action. The Administrator promptly took an appeal from this judgment to the United States Circuit Court of Appeals for the Sixth Circuit where the matter is now pending. It is significant that, subsequent to the judgment of the district court, the new plan inaugurated by the Cincinnati Company was gradually adopted at other terminal companies throughout the country.

At this point it is appropriate to mention the fact that after the Administrator filed suit against the Cincinnati Company, as above stated, red caps employed previously under the accounting and guarantee system instituted or caused to be instituted in various district courts of the United States, fifteen or more suits under section 16 (b) of the act to recover unpaid minimum wages, liquidated damages and reasonable attorney's fees under section 16 (b) of the act. In only two of these cases have judgments

been entered. In *Pickett* v. *Union Terminal Company,* 33 F. Supp. 244 (U. S. D. C. N. D. Tex.) the court entered judgment on May 28, 1940 for $38,626.99 plus liquidated damages in an equal sum, together with an attorney's fee and costs of the proceeding. The court held that since the red caps had promptly protested the inauguration of the accounting and guarantee system on October 24, 1938, there was no contract under which the tips received by the red caps from passengers became the property of the company, and therefore that the tips did not become wages paid by the company to the red caps as required by the act. The defendant company has taken an appeal to the United States Circuit Court of Appeals for the Fifth Circuit where the matter is now pending. In a similar suit, *Williams* v. *Jacksonville Terminal Company* (the case has not yet been reported), the District Court of the United States for the Southern District of Florida, Jacksonville Division, held that the red caps were not employees of the company, but that even if they were the tips were wages within the meaning of the act, and accordingly, the court, on October 21, 1940, gave summary judgment in favor of the defendant company. We have been advised that the plaintiff in this case is taking an appeal to the United States Circuit Court of Appeals for the Fifth Circuit and that that court has indicated that the appeal will be heard together with the appeal in the *Pickett* case. A brief on behalf of the Administrator as *amicus curiae* has been filed with the court in the *Pickett* appeal, and the position of the Administrator therein set forth is that tips reported under the accounting and guarantee system were not wages paid them by the company within the meaning of the act.

Copies of this brief are enclosed for your perusal. It is not unlikely that a supplementary brief will be filed on behalf of the Administrator in conjunction with the appeal in the *Williams* case.

Returning now to the new plan of employment of red caps since February 1, 1940, it appears that while considerable publicity was given by each company to its inauguration of the new plan, the fact that the 10 cents per bag or parcel collected by the red caps was to be paid over to the company, was not made clear. In some instances it was not even mentioned, and for a while it further appears that numerous passengers assumed that in addition to the minimum wage the red cap was getting the benefit of the 10 cent charges collected. Moreover, at least some of the publicity given the new plan by the companies made it appear that the Fair Labor Standards Act and the Administrator of the Wage and Hour Division forced the railroads to adopt such a system. The attached copy of General Hugh S. Johnson's column, published in various newspapers on or about September 19, 1940, referred to the system as regimentation "by the wages and hour administration." In view of the inaccuracies upon which General Johnson relied, I sent him a letter, a copy of which is enclosed, in which I undertook to correct General Johnson's understanding of the problem as well as that of his readers. Excerpts from this letter were published by General Johnson in his column a day or so later.

In numerous other instances newspapers have featured the "plight" of the red caps under the new plan. Moreover, a large volume of inquiries, petitions, resolutions, etc., have been forwarded by individuals and organizations to the White House, members of

Congress, and heads of various federal agencies, all for a common purpose, namely, to secure federal participation in finding a more satisfactory solution of the problem than has been provided by the systems employed by the railroad companies. While the Administrator has undertaken to the extent in keeping with his statutory authority to answer these communications, it is believed that the adoption of S. Res. 325 will enable him to be more responsive to the public interest therein manifest.

It is clear that neither the Fair Labor Standards Act nor any other federal law or regulation that I know of requires the railroads to adopt or continue the present plan; the Wage and Hour Division certainly never suggested it, has not endorsed it, and does not require it. Indeed, I am advised that a passenger filed a sworn complaint with the Interstate Commerce Commission several months ago charging that the Cincinnati Union Terminal Company, under the plan which it inaugurated February 1, 1940, has violated several provisions of the Interstate Commerce Act, and that the Interstate Commerce Commission conducted a public hearing with respect to such complaint and will in due course reach a decision with respect thereto. I mention this proceeding because under sub-paragraph (1) of S. Res. 325 I would be required to report to the Senate whether the new plan or practices violate the Fair Labor Standards Act "or other Federal statutes."

The preliminary findings upon recent investigations of the Grand Central Terminal in New York City and the Washington Terminal Company in this city may be summarized. On the one hand, there are indications of public dissatisfaction with the

new plan. Many passengers think that the cost of the railroad ticket should cover red cap service and that the 10 cent charge is in reality an involuntary tipping system which keeps the cost of the service on the public rather than the company. Further, many passengers complain that they no longer receive the "personalized" attention of the red cap as they did under the voluntary tipping system but instead receive a sort of mechanical attention which shows some signs of a "speed-up" system. For example, one red cap, by the use of a truck, may now undertake to carry the baggage of several passengers which, of course, inevitably entails slight delays due to comingling and some confusion of baggage, etc.

On the other hand, dissatisfaction of the red caps under the new plan is much more poignant. At the Washington Terminal the more industrious red cap complains that the incentive to him to give the best possible personalized service to the passenger has been very materially impaired. Regardless what his collections are from passengers for an eight-hour day, he is paid wages at the flat minimum rate, namely, $2.40. It has not been uncommon for numerous red caps to collect charges in sums ranging from $3 to $5 per day but they get no more wages for that day's work than the red caps who collected only $1 or $2 in charges. The red caps say that if they give particularly good service to a passenger it is possible that they may receive in addition to the regular charge a small tip which they are authorized to keep, but that in giving such particularly good service they do so at the expense of the day's volume of service to all passengers that come their way. Thus, it is better to give the mechanical speeded up service and

thereby "make" $2.40 or more for the day's work than it is to give more satisfactory service to a lesser number of passengers and thereby fall below a total of charges equal to $2.40. In other words, the few additional tips for special service do not offset the impression of the red cap's supervisors that his receipt of less than $2.40 is due to lack of industry or "efficiency" instead of painstaking efforts to please the patrons of the company.

At the Grand Central Terminal in New York the situation differs from the foregoing. There, by virtue of a collective bargaining agreement, a kind of bonus arrangement exists, in that each red cap is entitled to keep 8¼ cents of each 10 cent charge collected in excess of the sum of $2.90 which is arrived at by adding overhead expense at 50 cents per day to the minimum wage of $2.40. It seems clear that such an arrangement insures greater incentive to the red cap than the Washington system.

Not only has the Washington red cap's incentive to give the maximum service been seriously impaired, he has been further discouraged in the knowledge that the Washington Terminal Company has enjoyed a considerable profit under the new system. The company's records for a period of five and a half months indicate a gross annual profit to the company of approximately $50,000. Contrasted with this, the records of the Grand Central Terminal at New York indicate no profit, but rather, a small deficit.

Another circumstance disturbing to the red caps is the common feeling that they must collect from passengers sufficient charges to equal the minimum wage at least. The feeling is that if they fall below the minimum wage with any frequency they are

immediately suspected of "inefficiency." It does not appear that this feeling on the part of the red caps is illusory since the frequency of discipline (in a major terminal not here under discussion, discharges of such red caps were numerous) of the red caps by the company for minor infractions of the various rules governing their conduct has markedly increased, and most if not all of the red caps so disciplined fall in the category of those who do not consistently "make" $2.40 worth of charges each day. This may explain the so-called "speed-up" to make $2.40 a day regardless of the comfort or convenience of the public. The older and physically less able employees claim that the speed-up is a strenuous condition from their standpoint. Other employees who, though physically able to endure successfully the speed-up, find it difficult nevertheless to make $2.40 per day because of assignments to low revenue producing locations. For example, an employee who handles only incoming train passengers suffers a disadvantage when compared to a red cap who handles the outgoing as well as the incoming passengers.

The red caps complain of increased nervous strain and humiliation in the performance of their services. Dissatisfied passengers often "take it out" on the red caps. Some passengers refuse to allow tags to be attached to their baggage and refuse to pay for the tags. In such situations the red cap is obliged by regulation to take the passenger to the station master who they say always decides in favor of the passengers against the red caps without clearly absolving the red caps (when they have acted in strict conformity with company regulations) from the blame that the

passengers would place on them. In other situations passengers "walk off" without paying the charge, in which case a suspicion is aroused that the red cap has embezzled the charge and is lying about it. In many other situations the red cap is "spotted" by other employees of the company in any situation in which he may be alleged to have committed any infraction of the numerous regulations governing his conduct. Many complaints have been filed by such other employees, and it appears that the red caps do not always enjoy the benefit of confrontation by the complainant or accuser.

Another source of dissatisfaction to the red caps is the fact that other employees of the company, such as baggage room porters and cleaners (charwomen, etc.), whose occupations furnish little or no revenue to the company and whose labor is less strenuous are nevertheless paid wages at higher hourly rates. These employees have always been acknowledged to be employees of the company and as such have gained status and have accumulated benefits under the Railroad Retirement Act, whereas the red caps, until the company started to pay them regular wages under the new system, were not regarded as employees, and therefore had a questionable status and accumulated no benefits under the Railroad Retirement Act.

In Washington and New York the red caps complain that the cost of living is higher than in other metropolitan centers and that it is impossible for a red cap to maintain a family in decency and self-respect on $2.40 a day. Many of them claim that they need supplementary public relief but cannot get it because they are already

employed. In this connection it is pertinent to mention that the industry committee for the railroad industry, convened by the Administrator pursuant to section 8 of the act, has filed with the Administrator its report and recommendation that the minimum hourly rate of pay of employees of trunk line railroads be increased from 30 to 36 cents, which, if approved by the Administrator, will result in a wage of not less than $2.88 for an eight-hour day instead of $2.40, for red caps as well as other railroad employees.

Perhaps of most immediate concern to the Administrator of the Fair Labor Standards Act is the condition found in both terminals under discussion whereby the red caps are required to purchase uniforms made according to specifications of the company and maintain them by proper cleaning and mending, at their own expense. In the case of the Washington red caps who make the minimum wage only, a question arises whether this condition has not resulted in their having received less than the minimum wage, in violation of the act. Another condition found is that the red cap is required to make good any loss due to the losing of baggage, etc. Here again, the question arises whether a red cap who has been required to make good such loss has thereby been denied the minimum wage. At the New York terminal red caps are likewise required to bear the expense of uniforms but evidently they are not made liable for loss of baggage.

Should S. Res. 325 be adopted during the closing weeks of the 76th Congress, there would be an insufficient period of time within which the investigation directed therein could be conducted during the pres-

ent Congress. Accordingly, it is recommended that the resolution be amended to provide that the report of the Administrator required to be made under S. Res. 325 may be submitted to the President of the Senate not later than April 1, 1941.

In conclusion, it is appropriate for me to restate what I said at the beginning of this report, namely, that in view of the findings upon recent inspections of the Grand Central Terminal and the Washington Union Terminal, together with experience accumulated by the division in dealing with the matter generally since the effective date of the act, it is my judgment that the public interest will be best served by the adoption of S. Res. 325, and I accordingly recommend that the same be adopted, with the amendment suggested in the preceding paragraph.

The Bureau of the Budget has advised that it has no objection to the submission of this report.

Sincerely yours,

(Sgd.) PHILIP B. FLEMING,
Administrator.

Enclosures (5)

(Set of enclosures sent with both original and tissue copy.)

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